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Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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Investigation on Motion of the Department of  
Natural Resources of an Alleged Unlawful Deposit  
of Fill Material on the Bed of Green Bay, Oconto  
County, Wisconsin by James Johnson

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Case No. 3-NE-98-0089 UG

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Department of Natural Resources (Department) staff conducted field investigations and allege that James Johnson deposited fill material on the bed of Green Bay in violation of the terms of a dredging contract between the Department and Mr. Johnson and in violation of sec. 30.12, Stats. Pursuant to due notice, a hearing was conducted on May 7, 1998, in Oconto, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. The last submittal was received on June 22, 1998.

In accordance with secs. 227.47 and 277.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

James Johnson  
5072 Brown Road  
Little Suamico, WI 54141

Wisconsin Department of Natural Resources, by

Charles Hammer, Attorney  
P. O. Box 7921  
Madison, WI 53707-7921

FINDINGS OF FACT

1. James Johnson owns real property located in the NE ¼ of the SE ¼ of Section 31, Township 26 North, Range 21 East, Town of Little Suamico, Oconto County, Wisconsin. The property abuts Green Bay which is navigable in fact.

2. Mr. Johnson applied for a contract to dredge 1200 cubic yards of material from the bed of Green Bay adjacent to his property. The purpose of the dredging was to construct a wildlife pond. The area to be dredged was 75 feet wide, 150 feet long and five feet deep.

3. On June 8, 1989, the Department of Natural Resources (Department) issued a contract to James Johnson authorizing the above-described dredging project. A condition of the contract was that the dredge spoils be deposited on an upland site away from the pond area and none of the removed materials shall be deposited upon any part of the bed of the lake below the ordinary high water mark (OHWM). The OHWM at this site was determined to be at 581.5 MSL. At the same time the Department informed Mr. Johnson of his right to appeal the Department's decision if he disagreed with it or any part of it. Mr. Johnson did not appeal the decision including the conditions attached to the contract.

4. James Johnson began construction of the wildlife pond. Department employees conducted a site inspection of the project on March 20, 1991. At that time, Mr. Johnson had deposited dredge spoils and constructed a berm along the north and east sides of the dredged pond. The area where the fill was placed is below the OHWM of Green Bay. By letter dated March 25, 1991, the Department confirmed the results of the site visit, reminded Mr. Johnson that the dredging contract was conditioned on removing the dredging spoils to an upland site, and informed him that the Department considered the deposition of the dredging spoils on the bed of Green Bay below the OHWM a violation of sec. 30.12, Stats. Mr. Johnson was instructed that unless he removed the fill material, an enforcement action against him would be commenced.

5. In June, 1991, Mr. Johnson requested a two-year extension to complete the project. By letter dated June 18, 1991, the Department granted the extension request conditioned on Mr. Johnson removing the spoil and fill material which had been placed around the pond below the OHWM and on any additional material excavated as part of the pond construction being immediately hauled and placed on an upland site.

6. On August 23, 1991, Department employees conducted another site inspection of the project and determined that the fill material had not been removed from around the pond. By letter dated September 6 and 20, 1991, the Department revoked the contract extension. The Department further advised Mr. Johnson that since his original contract had expired on June 8, 1991, he had no authority to perform any additional work at the site.

7. The Department conducted a third site inspection on April 1, 1992. As of the date of the hearing the fill material had not been removed from the area adjacent to the pond.

## DISCUSSION

There is no significant factual dispute in this case. Mr. Johnson does not dispute that when he dredged the wetlands to construct a wildlife pond he deposited the dredged spoils and the other fill material along the bank of the pond. According to the Department's calculations, this area is below the OHWM of Green Bay. The contract issued by the Department clearly was conditioned on Mr. Johnson not placing any dredged spoils or other fill material below the

OHWL of Green Bay. In various communication between the Department and Mr. Johnson this condition was made abundantly clear to Mr. Johnson. After the Department discovered that Mr. Johnson had in fact placed fill material on the bed of Green Bay, Mr. Johnson refused to remove this material despite numerous requests and threats from the Department.

Mr. Johnson does not dispute that he has violated the conditions of the dredging contract issued by the Department. Rather he argues that he is justified in doing what he did. Mr. Johnson argues that his actions are justified because:

- 1) The pond he has constructed has enhanced the value of this property as wildlife habitat;
- 2) The property owner to the north was permitted to fill in an extensive amount of wetlands and Mr. Johnson feels he should be allowed to fill a relatively small amount; and,
- 3) The subject property has been in Mr. Johnson's family for several generations. Over time as the water level of Green Bay has risen, much of the property is now below water. Mr. Johnson has lost a substantial amount of land on the bay side of his property and feels this justifies his filling wetlands on the other side of his property to gain additional land.

The Department witnesses attempted to respond to these arguments, but were unable to satisfy Mr. Johnson. Although one can empathize with Mr. Johnson's situation, the deposition of fill material along the sides of the pond clearly violate the conditions of the contract issued to Mr. Johnson. The only conceivable defense in this matter would be if Mr. Johnson could have shown that the area where he placed the fill is above the OHWL. Mr. Johnson did not attempt to do so. The evidence in the record is that the OHWL exists at 581.5 feet MSL. Using this elevation as the OHWL, the fill material placed by Mr. Johnson is clearly below it and Mr. Johnson has violated the conditions of the permit issued by the Department.

At the hearing and in the briefs he filed after the hearing, Mr. Johnson also asked that he be issued whatever permit he needs to complete and maintain the project. The hearing that was held was an enforcement action. No Ch. 30, Stats., permit could be issued to Mr. Johnson without satisfying the procedural requirements of Ch. 30, Stats., including public notice. Additionally, it does not appear that any permit pursuant to Ch. 30, Stats., is available that would authorize the project Mr. Johnson has constructed.

#### CONCLUSIONS OF LAW

1. Pursuant to sec. 30.12(1), Stats., unless a permit has been granted by the Department, or the legislature has otherwise authorized it, is unlawful to deposit any material upon the bed of any navigable water. No permit has been issued authorizing Mr. Johnson to deposit material on the bed of Green Bay. To the contrary, the dredging contract issued by the Department expressly forbids the deposition of any material below the OHWL of Green Bay.

2. The deposition of this fill material on the bed of Green Bay is a violation of secs. 30.12, 30.15 and 30.20, Stats. Pursuant to sec. 30.294, Stats., the deposition of fill material is declared to be a public nuisance.

3. The Division of Hearings and Appeals has the authority to issue the following order.

### ORDER

James Johnson shall cause the dredged spoils and any other fill material placed below the OHWM on the bed of Green Bay to be removed to an upland site within 90 days of the date of this order. Mr. Johnson shall notify Robert Rosenberger (phone 715-582-5041) at least five days prior to the removal of the material and allow Mr. Rosenberger on site during the removal process. Mr. Rosenberger shall assist in identifying which materials are fill materials and which constitute natural lake bed.

Dated at Madison, Wisconsin on August 19, 1998.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By Mark Kaiser  
MARK J. KAISER  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.